ORIGINAL

No. 98-7540

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

SCOTT LESLIE CARMELL,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari
To the Court of Appeals for the Second District of Texas

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through the Attorney General of Texas, and files this Brief in Opposition to Petition for Writ of Certiorari.[1]

OPINION BELOW

The Court of Appeals for the Second District of Texas affirmed Carmell's convictions for eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault on February 12, 1998. *Carmell v. State*, 963 S.W.2d 833 (Tex.App.-Fort Worth 1998, pet. ref'd), Appendix A to Petition. His motion for rehearing and subsequent petition for discretionary review by the Texas Court of Criminal Appeals were

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[1] For clarity, the respondent will be referred to as "the state" and the petitioner as "Carmell."

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overruled and refused, respectively, without written order.

JURISDICTION

Carmell seeks to invoke the Court's jurisdiction under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Carmell bases his claims upon Article I, Section 10 of the United States Constitution and the fifth, sixth and fourteenth amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

Carmell was indicted for the offenses of indecency with a child (eight counts), aggravated sexual assault (two counts) and sexual assault (five counts). Tr 2-7.[2] Carmell pleaded not guilty to all counts, was tried before a jury in the 367th Judicial District Court of Denton County, Texas, and on January 14, 1997, was found him guilty of all fifteen counts. Tr 140-99. The jury assessed Carmell's punishment at imprisonment for twenty years for each of the indecency-with-a-child and the sexual-assault counts and imprisonment for life for the aggravated-sexual-assault counts, sentences for all counts to be served concurrently. Tr 140-99.

Carmell appealed his convictions to the Court of Appeals for the Second District of Texas, which affirmed on February 12, 1998. *Carmell v. State*, 963 S.W.2d 833 (Tex. App.-Fort Worth 1998, pet. ref'd). The court overruled Carmell's motion for rehearing on March 26, 1998, and the Texas Court of Criminal Appeals refused Carmell's petition for

[2] "Tr" refers to the transcript of trial papers filed with the court during Carmell's trial, preceded by volume number and followed by page number. "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number.

discretionary review (PDR) on September 16, 1998. *Carmell v. State*, No. 837-98. Carmell's petition for writ of certiorari followed.

B. Statement of Facts

The state court of appeals' opinion summarizes the facts of the case as follows:

> Ron Borchert and Eleanor Alexander married in 1972. K.M. was born on March 24, 1978. Eleanor began to see [Carmell], a counselor specializing in counseling victims of incest, because she was an incest survivor. In early 1987, Eleanor divorced Ron and married [Carmell] the next year.
>
> By the time K.M. was twelve, [Carmell] would give her a back rub every night after she said her prayers. Soon the back rubs changed, and [Carmell] would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, [Carmell] touched her "on the pubic hair" during one of the back rubs. [Carmell] then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. [Carmell] claimed that this was part of the family's bonding process.
>
> In the summer of 1991, [Carmell] took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, [Carmell] and K.M. were sleeping together nude when [Carmell] pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, [Carmell] took K.M. into his bedroom for a "nap." They undressed, and [Carmell] pulled her on top of his erect penis, touching her "genital area."
>
> These incidents and more finally led to [Carmell] having sex with K.M. in September 1993. Two days later, [Carmell] "married" K.M. in a mock ceremony and continued having sex with her until early 1995. K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited [Carmell] in jail, he wrote "adultery with [K.M.]" on a piece of paper when she told him that he needed to confess if he was sorry for what he had done to K.M.

Carmell v. State, 963 S.W.2d at 835 (footnote omitted).

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Carmell fails to advance a compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. THE APPLICATION OF THE AMENDED VERSION OF ARTICLE 38.07 OF THE TEXAS CODE OF CRIMINAL PROCEDURE TO AN OFFENSE WHICH OCCURRED PRIOR TO THE AMENDMENT DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE.

Carmell contends that the Texas court's application of the 1993 amended version of Article 38.07 of the Texas Code of Criminal Procedure to an offense committed in 1992,[3] prior to the amendment,[4] violated the *Ex Post Facto* Clause and the fifth and fourteenth amendments to the United States Constitution. Petition for Writ of Certiorari, hereinafter "Petition," at 4. Carmell alleges that the application of the amended version of Article 38.07 deprived him of a defense and reduced the state's burden of proof. Petition at 5-6. However, the Texas court's application of the amended version of article 38.07 did not violate *ex post*

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[3] Carmell complains only about his conviction for sexual assault (count seven) committed on or about June 1, 1992. Petition at 4. The amended version of article 38.07 was also retroactively applied to three of the indecency-with-a-child counts (counts eight, nine, and ten) committed on or about March 1, 1993, June 1, 1993, and April 1, 1993, respectively. *See Carmell v. State*, 963 S.W.2d at 836 n.5.

[4] The amended version of the statute was effective on September 1, 1993.

facto principles, and the court below correctly concluded that Carmell is not entitled to a reversal of his conviction on this basis.

The version of Article 38.07 in effect on June 1, 1992, the date of the sexual assault offense in question, provided as follows:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.

TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 1992). Effective September 1, 1993, Article 38.07 was amended to provide as follows:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense.

TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 1994). Thus, corroboration of a fourteen-year-old victim's testimony was no longer required at the time of Carmell's 1997 trial, even when the victim had not made an outcry for several years.

The victim of the offense in question was fourteen years old on June 1, 1992, the date of the offense, and did not make an outcry until March of 1995. 9 SR 58, 162; 10 SR 278-79. Carmell asserts that the application of the amended statute to an offense committed prior to the amendment constituted an *ex post facto* violation. Specifically, Carmell argues that,

had the 1992 version of the statute been applied, he would have been entitled to an acquittal at trial or on direct appeal.[5] Petition at 5-6.

Article I, Section 10 of the United States Constitution forbids the states to pass *ex post facto* laws. This Court has squarely rejected the proposition that retroactive changes in law violate the *Ex Post Facto* Clause merely because they adversely affect the position of criminal defendants. *Collins v. Youngblood*, 497 U.S. 37, 45 (1990); *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977); *Beazell v. Ohio*, 269 U.S. 167, 170-71 (1925). Rather, "the Clause is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *California Dept. of Corrections, v. Morales*, 514 U.S. 499, 504 (1995), (quoting *Collins*, 497 U.S. at 43). The constitutional prohibition against *ex post facto* laws is triggered only by changes in law which: (1) punish as a crime an act previously committed which was innocent when done; (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of a defense available according to law at the time the act was committed. *Collins*, 497 U.S. at 52.

Plainly, the amended version of Article 38.07 neither criminalizes previously innocent conduct, nor enhances the punishment for an existing crime, nor renders unavailable to Carmell a defense that was available at the time he committed the offense. Carmell does not contend that the application of the amended version of the statute effected a change in the definition of the offense he committed or altered the punishment he could receive for that offense. Instead, he argues that he was deprived of an affirmative defense. Petition at 5-6.

[5] On direct appeal, Carmell asserted that the trial court committed reversible error when it denied his motion for an instructed verdict due to insufficient evidence because there was no outcry until years after the offenses and there was no corroborating evidence. *Carmell v. State*, 963 S.W.2d at 835-36.

Carmell's attempt to characterize the statutory requirement of corroboration in cases where there was no outcry within six months as a defense, whose retroactive abolition would fall within the ambit of *Collins*, is unavailing. Carmell's "use of the word 'defense' carries a meaning quite different from that which appears in . . . *Beazell*, where the term was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.'" *Collins*, 497 U.S. at 50 (quoting *Beazell*, 269 U.S. at 169-70). The "defense" Carmell claims was available to him under prior Texas law was not one related to the definition of the crime; rather, it was based on the law regulating sufficiency of the evidence. *See* Petition at 6 (citing *Sloggan v. State*, 799 S.W.2d 679, 683 (Tex. Crim. App. 1990)). By applying the version of Article 38.07 in effect at the time of Carmell's trial, Texas did not change the elements of the offense, "or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge . . . ." *Collins*, 497 U.S. at 50.[6] Thus, application of the amended version of Article 38.07 did not violate the constitutional prohibition against *ex post facto* laws, as the state court of appeals correctly determined. Because this allegation requires only the application

[6] In *Hopt v. Utah*, 110 U.S. 574 (1984), this Court rejected an *ex post facto* challenge to the retroactive application of a statute making felons competent to testify. However, the Court went on to opine that "[a]ny statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, *might*, in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws." *Id.* at 590 (emphasis added). This language is mere dicta and, in any event, did not survive the Court's opinion in *Collins*, whose definition of ex post facto violations does not include changes in evidentiary rules. *Collins*, 497 U.S. at 42-43; *see, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (civil commitment statute does not apply retroactively because it is based on offender's current mental state, and "[t]o the extent that past behavior is taken into account, it is used . . . solely for evidentiary purposes").

of settled law to the facts of the case, it does not warrant exercise of this court's certiorari jurisdiction. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

III. CARMELL'S SIXTH AMENDMENT CLAIM IS NOT PROPERLY BEFORE THE COURT.

Carmell alleges that his sixth amendment right of confrontation was violated because the state court of appeals erred in concluding that "evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused . . . ." Petition at 7. This claim is not properly before the Court because it was not presented to the court below.

This Court has consistently held that it will not decide issues raised for the first time on petition for certiorari and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

In his brief in the state court of appeals, Carmell alleged that the prosecution failed to disclose material impeachment evidence in violation of the Due Process Clause of the fourteenth amendment as construed in *Brady v. Maryland*, 373 U.S. 83 (1963). Appellant's Brief, attached hereto as Appendix A, at 3-5. The court of appeals rejected this claim because the evidence was inadmissible as a matter of state law under Rule 608(b) of the Texas Rules of Evidence. *Carmell v. State*, 963 S.W.2d at 838. "Because the evidence was inadmissible, the State did not have to produce it . . . ." *Id.*

Thereafter, in his PDR to the Court of Criminal Appeals, Carmell alleged that the state's failure to disclose this evidence violated his sixth amendment confrontation rights as construed in *Davis v. Alaska*, 415 U.S. 308 (1974). Appellant's Pro Se Petition for Discretionary Review, attached hereto as Appendix B, at 609. His petition for writ of certiorari likewise relies on *Davis* and asserts a Confrontation Clause violation. Petition at 7-10.

Because Carmell did not raise his sixth amendment claim in the state court of appeals, it is not properly before this court. Moreover, that he raised it in his PDR in the Court of Criminal Appeals is insufficient to allow this Court to consider it. Under Texas law, the Court of Criminal Appeals may not grant discretionary review on an issue that was not presented to the court of appeals. *Lambrecht v. State*, 681 S.W.2d 614, 616 (Tex. Crim. App. 1984); *Ayala v. State*, 633 S.W.2d 526, 528 (Tex. Crim. App. 1982); *see Castille v. Peoples*, 489 U.S. 346, 351 (1989) (raising a claim for the first time in a petition to Pennsylvania's highest court on discretionary review did not constitute a "fair presentation" of the claim to satisfy the requirement that a federal habeas petitioner exhaust his state remedies). Because Carmell's brief in the court of appeals relied solely on the Due Process Clause of the fourteenth amendment rather than the Confrontation Clause of the sixth amendment, the sixth amendment issue raised in his PDR was not properly before the Court of Criminal Appeals. Carmell's failure to present his confrontation claim at the proper point in the state court proceedings bars review of it in this Court. *Beck v. Washington, supra; Godchaux Co., Inc. v. Estopinal, supra.*

IV. THE STATE COURT CORRECTLY DENIED CARMELL'S ALLEGATION THAT THE STATE WITHHELD IMPEACHMENT EVIDENCE AGAINST A STATE'S WITNESS IN VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963).

Carmell alleges that his fourteenth amendment rights were violated because the court of appeals of Texas erred in concluding that "evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused . . . ." Petition at 7. Because Carmell's confrontation claim is not properly before the Court, the only conceivable basis for certiorari jurisdiction on this allegation is the claim that he pressed in the state court of appeals, *i.e.*, a violation of *Brady v. Maryland*. Because Carmell's petition for writ of certiorari is silent as to *Brady* and the Due Process Clause, however, it likewise is doubtful that that claim is properly before the Court. Assuming *arguendo* that it is, it is far too insubstantial to warrant exercise of the Court's jurisdiction.

Carmell argues that the state intentionally withheld evidence favorable to his defense, specifically, the fact that Carmell's wife, Eleanor, the mother of the victim, bore another man's child while Carmell was in jail awaiting trial. Petition at 8. The state court of appeals found that under Rule 608(b) of the Texas Rules of Criminal Evidence, "[a]ny evidence showing Eleanor's sexual relationship with another man and proving that she had his baby would be inadmissible as impeachment evidence," thus, the state did not have to produce the evidence. *Carmell v. State*, 963 S.W.2d at 838. To the extent Carmell complains about the state court's interpretation of Rule 608(b) of the Texas Rules of Criminal Evidence, he has failed to state a claim worthy of this court's review. *See Moran v. Burbine*, 475 U.S. 412, 429 n.3 (1986) (the Court may not disregard a state court's interpretation of state law); *California v. Freeman*, 488 U.S. 1311, 1313-15 (1989) ("Interpretations of state law by a State's highest court are, of course, binding upon this Court."). To the extent Carmell argues

that the state court incorrectly denied his allegation that the state withheld impeachment evidence against a state's witness in violation of *Brady*, his claim is not worthy of this Court's review.

Under *Brady*, the state has an affirmative duty to disclose to the defense evidence that is both favorable to the accused and material either to guilt or to punishment. *United States v. Bagley*, 473 U.S. 667, 674 (1985). Such favorable evidence includes impeachment evidence. *Id.* at 676. Further, the prosecutor's good or bad faith is irrelevant to the question of whether the state violated a defendant's rights under *Brady*. *See United States v. Agurs*, 427 U.S. 97, 110 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

To succeed on a *Brady* claim, the petitioner must establish: (1) the prosecution suppressed evidence; (2) the evidence was favorable; and (3) the evidence was material either to guilt or punishment. *Brady*, 373 U.S. at 87. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the trial's outcome. *Id.* Further, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10. Rather, the petitioner must show that the evidence in question could reasonably be taken to put the whole case in a different light so as to undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In this case, the prosecutor admitted that while the jury was out deliberating on Carmell's guilt or innocence, Carmell's attorney had asked her if a baby that he had observed

belonged to either Carmell's wife, Eleanor, or her daughter, the victim, Michelle, and the prosecutor lied and told Carmell's attorney that the baby belonged to a witness. Tr 260-61. The prosecutor also admitted that she knew Eleanor had become pregnant and given birth to another man's child approximately eight months before the trial in question and that she did not inform Carmell's attorney. Tr 261. Carmell's attorney discovered that the baby was actually Eleanor's child prior to the commencement of the punishment phase of the trial. 12 SR 5-6. During the punishment phase, the trial court would not allow Carmell's attorney to elicit any testimony regarding the baby. 12 SR 24-25; 13 SR 149-53. Carmell asserts that evidence of the baby's paternity should have been admitted as impeachment evidence to show that Eleanor's testimony was not credible and that she had a motive for testifying against him. Petition at 8-10.

Because the state court of appeals found that the undisclosed evidence was inadmissible, it could not have had a direct affect on the outcome of the trial. *See Wood v. Bartholomew*, 516 S. Ct. 1, 6 (1995) (disclosure of inadmissible polygraph results "could have had no direct effect on the outcome of the trial, because respondent could have made no mention of them either during argument or while questioning witnesses"). Carmell has not specified any admissible evidence to which the disclosure of the baby's parentage would have led.

It is unreasonable to believe that the jury would have reached a different outcome had it been informed that Eleanor, the victim's mother, had another man's baby. Eleanor testified that Carmell was already in jail on the charges in question when the child was conceived. 13 SR 152. Carmell's attorney even admitted that the evidence indicated that Carmell was guilty of at least some of the counts. 11 SR 367. Because a *Brady* materiality analysis must be performed in the context of an objectively reasonable jury, this Court in

Bagley adopted the *Strickland*[7] prejudice test to evaluate the materiality of suppressed evidence. *Bagley*, 473 U.S. at 682. The *Strickland* Court explained,

> [t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695.

The victim testified at length about the ongoing sexual abuse by her stepfather, Carmell, beginning when she was approximately twelve years old. 9 SR 72-76, 80-123, 131-42, 145-47, 158-59. Eleanor, the victim's mother, testified that Carmell admitted that he had committed "adultery with Michelle." 10 SR 283. Thus, in light of the abundant evidence supporting the conviction, suppression of the inadmissible evidence that the mother of the victim had given birth to another man's baby while Carmell was in prison awaiting trial did not deprive Carmell of a fair trial. Because this allegation requires only the application of settled law to the facts of the case, it does not warrant exercise of this court's certiorari jurisdiction. *United States v. Johnson*, 268 U.S. at 227.

V. CARMELL'S INSUFFICIENCY CLAIM IS TOO INSUBSTANTIAL TO WARRANT CERTIORARI REVIEW.

Finally, Carmell contends that the evidence is insufficient to support four of his convictions. Specifically, he argues that the victim's testimony that his penis touched her "genital area" or "pubic hair" does not satisfy the Texas statutes proscribing sexual assault and aggravated sexual assault of a child, and indecency with a child, which require contact

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[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

with the "sexual organ" and "any part of the genitals" of the child, respectively. Petition at 10-13.

It is true that a claim of insufficient evidence presents a federal constitutional claim. *Jackson v. Virginia*, 443 U.S. 307, 322 (1979). Nonetheless, Carmell's contention involves nothing more than an unremarkable interpretation of the terms of a state penal statute. *See Carmell v. State*, 963 S.W.2d at 837 (the state court of appeals found that the victim's testimony that Malone contacted her "genital area" and/or "pubic hair" is sufficient to prove Malone contacted the victim's "genitals"). Carmell does not allege a failure of the state to prove that he engaged in the conduct in question; instead, his only submission is that the court below misconstrued state law in measuring his conduct against the applicable statutes. As such it is manifestly insufficient to warrant exercise of the Court's certiorari jurisdiction. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Brown v. Collins*, 937 F.2d 175, 181 (5th Cir. 1991) (in reviewing claim of insufficient evidence, "[w]e do no police every minutiae in state criminal procedural activity.").

CONCLUSION

For the foregoing reasons, the state respectfully requests this Court to deny Carmell's petition for writ of certiorari.

Respectfully submitted,

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CAUSE NUMBER 02-97-00197-CR

IN THE

COURT OF APPEALS

FOR THE

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH, TEXAS

****

SCOTT LESLIE CARMELL,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

****

ON APPEAL FROM THE 367TH DISTRICT COURT, DENTON COUNTY, TEXAS

CAUSE NUMBER F-96-1227-E

THE HONORABLE LEE GABRIEL, JUDGE PRESIDING

****

APPELLANT'S BRIEF

****

APPELLANT DOES NOT
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APPENDIX A

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CAUSE NUMBER 02-97-00197-CR

IN THE

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APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

****

CERTIFICATE OF THE PARTIES

In accordance with Tex.R.App.P. 74(a), the following is a list of the parties in this cause:

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CAUSE NUMBER 02-97-00197-CR

IN THE

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SCOTT LESLIE CARMELL,
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THE STATE OF TEXAS,
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****

APPELLANT'S BRIEF

****

TO THE HONORABLE JUDGES OF THE FORT WORTH COURT OF APPEALS:

BRIEF STATEMENT OF THE CASE

Appellant entered pleas of not guilty to the offenses of aggravated sexual assault (two counts), sexual assault (five counts), and indecency with a child (eight counts). All fifteen offenses were charged on the same indictment and tried together. The jury found Appellant guilty of all charges, and assessed punishment at two life sentences and thirteen twenty year sentences. Appellant was formally sentenced on January 14, 1997; and his Motion for New Trial was denied on March 24, 1997. Appellant timely gave notice of appeal on April 2, 1997.

POINTS OF ERROR

I. POINT OF ERROR NUMBER ONE

A. The Trial Court erred in not granting Appellant's motion for new trial based upon the failure of the prosecution to reveal the impeaching evidence which would have seriously undermined the prosecution's case. (The complained of error can be found at Tr. 225.)

B. Argument and Authorities

Approximately four weeks before trial, Appellant's trial counsel filed, and the Trial Court granted, a proper Motion for Discovery. (Tr. at 227). In spite of the Court's order, and in violation of the long-standing legal precedent originating with Brady v. Maryland, 373 U.S. 83 (1963), the State failed to disclose that one of its key witnesses, the wife of Appellant and mother of the complaining witness, had born a child while Appellant was incarcerated awaiting trial; and that the child was not that of her husband, the Appellant.

This information was obviously valuable to the Appellant as impeachment evidence. However, it was not revealed to the Defendant until the jury was deliberating at the guilt/innocence phase of the trial, and then only by accident when the witness's divorce attorney approached Appellant's trial attorney to discuss waiving paternity. In fact, the prosecution had deliberately lied to Appellant's trial counsel when specifically asked if the witness was the baby's mother. The State's attorney admits to withholding the information and lying to Appellant's trial counsel. (Tr. at 260-262.)

Under Brady, a prosecutor has an affirmative duty to turn over to the defense any evidence which is material and exculpatory. See also, Means v. State, 429 S.W.2d 490, 495

(Tex.Crim.App. 1968). Under U.S. v. Bagley, 473 U.S. 667, 676 (1985), the term "exculpatory evidence" includes any evidence which could be used to impeach the State's witness. This Court recently applied the Bagley rule in Johnston v. State 917 S.W.2d 135, 138 (Tex.App. — Fort Worth 1996, pet. ref'd), holding that evidence that impeaches the State's witness must be disclosed, and a failure to do so violates Brady.

In order to prevail on his Brady claim the Appellant is not required to show bad faith, or even specific knowledge, on the part of the prosecutor. "[I]nformation possessed by an agent of the State is attributed to the prosecutor, even without any intention to engage in misconduct on the part of the prosecutor." Johnston v. State, 917 S.W.2d at 138 (citing Reed v. State, 644 S.W.2d 494, 498-99 (Tex.App. — Corpus Christi 1982, pet. ref'd); Means v. State, 429 S.W.2d 490, 494 (Tex.Crim.App. 1968)). Thus, the prosecutor's proffered excuses for withholding the information (Tr. at 261-262) are moot.

The law is clear that impeachment evidence is material for purposes of the Brady analysis. For example, in Thomas v. State, 841 S.W.2d 399, 405 (Tex.Crim.App. 1992), the Court of Criminal Appeals noted that because the withheld evidence tended to cast doubt upon the reliability of the State's only witnesses, it would have undermined the State's case and was thus material. "Evidence such as that relating to the credibility of a witness whose testimony may be determinative of guilt or innocence is considered to be material." 2 Texas Criminal Practice Guide § 62.03[1][b] (1997). In the case at bar, this was one of the State's principal witnesses. Her testimony on direct and re-direct runs to some 85 pages, second in length only to the testimony of the complaining witness. Perhaps most damaging is her testimony that the Appellant allegedly confessed to her that he had sex with the complaining witness. (S.O.F. Vol. at 283.)

"Evidence withheld by a prosecutor is 'material' if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. . . . A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome of the trial." McFarland v. State, 928 S.W.2d 482, 511 (Tex.Crim.App. 1996), cert. denied, 117 S.Ct. 966 (1997).

A due process violation requiring reversal occurs when a prosecutor: (1) fails to disclose evidence, (2) favorable to the accused, (3) which creates a probability of a different outcome. Id. Each of these three prongs of the Brady test is met in the case at bar, and it was thus reversible error for the trial court to deny Appellant's motion for new trial.

II. POINT OF ERROR NUMBER TWO

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count One because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Count One charged the Appellant with Indecency with a Child under TEX.PENAL CODE § 21.11(a)(1), by sexual contact as that term is defined in TEX.PENAL CODE §21.01(2). Specifically, Count One of the indictment alleges that the Appellant "touch[ed] the genitals" of the complaining witness. (Tr. at 2.) TEX.PENAL CODE §21.01(2) defines "sexual contact" as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."

At trial, the following testimony was elicited on direct examination from the State's chief witness:

Q. Referring to count one, during one of the back rubs did Scott Carmell ever actually touch your genitals?
A. Yes, he did.
Q. How was it that he touched the genitals?
A. *Well, just on the pubic hair.*
Q. Okay. And the — the time that we're talking about, this happened in the spring of 1991 before your 13th birthday?
A. Yes.
Q. And was it while you were in the sixth grade?
A. Yes.
Q. Going to count two. . . .

(S.O.F. Vol. 9 at 80; emphasis added.) This brief exchange was the only evidence offered to prove Count One. The question, then, is whether this evidence is sufficient to prove that Appellant touched "any part" of the complaining witness's "genitals."

The Texas Court of Criminal Appeals, examining the very statute at issue here, held that the word genitals "includes more than just the vagina in its definition; the definition of 'genitals' includes the vulva which immediately surrounds the vagina." Clark v. State, 558 S.W.2d 887 (Tex.Crim.App. 1977)(citing Ball v. State, 289 S.W.2d 926 (Tex.Crim.App. 1956); Pendell v. State, 253 S.W.2d 426 (Tex.Crim.App.1952)). However, the State's witness did not testify that the Appellant touched her vagina, or her vulva, or even her "genitals." She testified only that the Appellant touched her "pubic hair."

Appellant can find no Texas authority for the proposition that the term "genitals" includes "pubic hair." As a practical matter, such an expanded definition of the statutory term "genitals" would lead to uneven results. For example, §21.01 also defines "deviate sexual intercourse" as "the penetration of the genitals . . . of another person with an object." TEX.PENAL CODE §21.01(1)(B). It seems unlikely that the Legislature was contemplating "pubic hair" when this statute was drafted, especially considering that some individuals are more hirsute than others. For

example, if a man's lower abdomen, from the umbilicus downward, is covered with hair, would it be an act of "deviate sexual intercourse" punishable as "public lewdness" under TEX.PENAL CODE §21.07 for his wife to intertwine her fingers in the hair near his umbilicus while they lay sunbathing at the beach? If not, how does the law propose to delineate which hairs are "pubic hairs" and which hairs are not?

The only practical means would be to define "pubic hairs" as those within a prescribed distance from some specific point on the human anatomy. In fact, defining the term "genitals" in some such more precise manner would seem to be the best solutuion to such problems; regardless of whether the area contains hair or not. But that is not what the Legislature has done. It has chosen to use the term "genitals," and the courts must provide the definition of this term. This Court should not conclude that the term includes "pubic hair."

Without further evidence of "sexual contact" by the touching of "any part of the genitals" of the complaining witness, the conviction on Count One cannot stand.

III. POINT OF ERROR NUMBER THREE

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Three because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Count Three charged the Appellant with aggravated sexual assault under TEX.PENAL CODE § 22.021, which states in relevant part, "[a] person commits an offense if the person intentionally or knowingly causes the sexual organ of a child to contact . . . the . . . sexual organ of another person, including the actor; and if the victim is younger than 14 years of age."

Specifically, Count Three of the indictment alleges that the Appellant "cause[d] the sexual organ of [the complaining witness] . . . to contact the sexual organ of the defendant." (Tr. at 3.)

At trial, the following testimony regarding Count Three was elicited on direct examination from the State's chief witness:

Q. Okay. What happened after you laid down in the sleeping bags together to go to sleep?
A. He pulled me on top of him.
Q. Okay. Was this before or after he had taken his shorts off?
A. This was after.
Q. When he pulled you on top of him, what did he do?
A. He — he put his penis between my legs.
Q. Okay. What part of your body did his penis touch?
A. *Genital area.*

(S.O.F. Vol. 9 at 90-91; emphasis added.) This testimony was the only evidence offered to prove the essential element of Count Three; i.e., that the Appellant had caused the witness's "sexual organ" to contact his own "sexual organ." The question, then, is whether testimony that a person's penis touched the "genital area" of another person is sufficient to prove that the first person's "sexual organ" contacted the "sexual organ" of the second person.

There can be no doubt that the penis is part of the male "sexual organ," so testimony regarding what the penis touched will be sufficient to prove a portion of the element of the offense. In other words, the witness is surely testifying that the Appellant's sexual organ touched her *somewhere*. But is she testifying that it touched *her* "sexual organ"?

Had she testified that it touched her "genitals," the question would not be presented. As noted above, "The Court of Criminal Appeals has held that 'genitals' includes more than the 'vagina'; it includes the vulva or tissue immediately surrounding the vagina. We detect no difference in the term 'genitals' or 'genitalia,' and 'female *sex organ*.'" Aylor v. State, 727

S.W.2d 727, 729-30 (Tex.App. — Austin 1987, pet. ref'd)(citing Clark v. State, 558 S.W.2d at 889)(emphasis added)). In short, had the witness testified that the Appellant's penis touched her "genitals" or "genitalia," Clark and Aylor would control and there would be no question of sufficiency of the evidence on this element. But the witness did not so testify. Instead, it was her testimony that the Appellant's penis touched her "genital area." The State's attorneys are well aware of the language of the statute, and are certainly capable of eliciting the required testimony from their witnesses. In fact, the witness testified that she had met with the State's attorneys prior to the trial in order to rehearse her testimony. (S.O.F. Vol. 9 at 77.)

There are, of course, numerous sex offense cases holding that medical precision is not required in the testimony of victim witnesses. These cases usually involve young children, the mentally handicapped, or others who, for one reason or another, simply cannot be expected to testify with the detailed vocabulary and detached emotions of a statute. However, in the case at bar, the complaining witness was a grown young woman, nearly nineteen years old, who was attending college. In other portions of the trial, she had no difficulty correctly and unabashedly using such terms as "pubic hair" (S.O.F. Vol. 9 at 80), "penis" (S.O.F. Vol. 9 at 91, 93, 104, 105, 112, 121, 146), "breasts" (S.O.F. Vol. 9 at 99, 102, 116), "condom" (S.O.F. Vol. 9 at 119, 136), and "having sex" (S.O.F. Vol. 9 at 132, 146). Furthermore, she testified that she did not need definitions of "erection" and "ejaculation" when the State's attorney used the words in direct examination, (S.O.F. Vol. 9 at 91, 95). Finally, the very fact that she used the phrase "genital area" suggests that she knew the word "genitals" well enough.

Does the phrase "genital area," as used by the witness, mean the area around and *including* the genitals? Or was she using the phrase to indicate that the contact was in the general

vicinity of, *but not on*, her genitals? Given that this is the central, essential element of the most serious offense charged, due process and fundamental fairness demands that a witness with this level of sophistication use language that conclusively proves the point in order to support the conviction. Anything less cannot be sufficient evidence. There was no reason this witness could not use the appropriate terms in her testimony. She obviously knew them and was capable of using them correctly, unlike a child or mentally handicapped person. The State had ample opportunity to elicit precise testimony to prove this element, and failed to do so. Uncorroborated testimony that the defendant's "penis" touched the witness's "genital area" should not, as a matter of law, be sufficient to support the conviction.

IV. POINT OF ERROR NUMBER FOUR

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Four because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Appellant incorporates by reference the argument and authorities section under Point of Error Number Three inasmuch as it relates to this Point of Error.

Count Four, like Count Three, charged the Appellant with aggravated sexual assault under TEX.PENAL CODE § 22.021. Also like Count Three, Count Four of the indictment alleges that the Appellant "cause[d] the sexual organ of [the complaining witness] . . . to contact the sexual organ of the defendant." (Tr. at 3.)

At trial, the following testimony regarding Count Four was elicited on direct examination from the State's chief witness:

Q. What did he do after pulling you on top of him?
A. Same thing. Put his penis between my legs.
Q. Did he do anything with his penis after he pulled you on top of him this time?
A. He pushed up against my *pubic area.*

* * * * * * * *

Q. What part — part of your body did his penis make contact with?
A. *Genital area.*

(S.O.F. Vol. 9 at 92-93, 95; emphasis added.) This testimony was the only evidence offered to prove the essential element of Count Four; i.e., that the Appellant had caused the witness's "sexual organ" to contact his own "sexual organ." As detailed above in Point of Error Number Three, phrases such as "pubic area" and "genital area" cannot be sufficient evidence to support conviction under TEX.PENAL CODE § 22.021.

V. POINT OF ERROR NUMBER FIVE

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Seven because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

Appellant incorporates by reference the argument and authorities section under Point of Error Number Three inasmuch as it relates to this Point of Error.

Count Seven charged the Appellant with sexual assault under TEX.PENAL CODE § 22.011. Like Counts Three and Four, Count Seven of the indictment alleges that the Appellant "cause[d] the sexual organ of [the complaining witness] . . . to contact the sexual organ of the defendant." (Tr. at 4.) The only difference between Count Seven and the previous two counts is that by the date the offense is alleged to have occurred, the complaining witness was over the age of 14 and

so the offense was sexual assault instead of aggravated sexual assault.

At trial, the following testimony regarding Count Seven was elicited on direct examination from the State's chief witness:

Q. After he pulled you on top of him, what part of his body touched your body?
A. His penis.
Q. Okay. And where did it touch you?
A. *Genital area.*

(S.O.F. Vol. 9 at 112, emphasis added.) This testimony was the only evidence offered to prove the essential element of Count Seven; i.e., that the Appellant had caused the witness's "sexual organ" to contact his own "sexual organ." As argued above in Point of Error Number Two, phrases such as "pubic area" and "genital area" cannot be sufficient evidence to support a conviction under TEX.PENAL CODE § 22.011.

VI. POINT OF ERROR NUMBER SIX

A. The trial court committed reversible error when it denied Appellant's motion for an instructed verdict on Count Seven because there was insufficient evidence to support a conviction. (The complained of error can be found at S.O.F. Vol. 10 at 373.)

B. Argument and Authorities

According to Count Seven of the indictment, the offense of sexual assault of a child under TEX.PENAL CODE §22.011 occurred on or about June 1, 1992. According to the only evidence offered to prove the offense, the testimony of the complaining witness, the offense occurred during the summer of 1992 after school was out. (S.O.F. Vol. 110-112.) The complaining witness was born on March 24, 1978, (S.O.F. Vol. 9 at 36), and so had attained her birth date for the year 1992 prior to school letting out for the summer. Therefore, the offense occurred when

the complaining witness was 14 years old.

Under the law that existed and was in effect at that time:

> A conviction under Chapter 21, Section 22.001, or Section 22.02, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense.

TEX.C.CRIM.PROC. Art. 38.07. The term "uncorroborated" was held to mean the absence of any eyewitness other than the victim. Heckathorne v. State, 697 S.W.2d 8, 12 (Tex.App. — Houston [14th Dist.] 1985, pet. ref'd); Shelby v. State, 800 S.W.2d 584, 586 (Tex.App. — Houston [14th Dist.] 1990), rev'd on other grounds, 819 S.W.2d 544 (Tex.Crim.App. 1991).

According to the Texas Court of Criminal Appeals, the purpose of the 1983 version of Art. 38.07 quoted above was to shield sexual assault victims under the age of 14, but to require stricter proof of offenses allegedly committed against victims age 14 and over. Scoggan v. State, 799 S.W.2d 679, 683 (Tex.Crim.App. 1990)(holding, in the case of a 15 year old victim, that "[s]ince corroboration or outcry requirements were not met in this case, the evidence is insufficient to support appellant's conviction.")

In the case at bar there was no outcry by the complaining witness until years after the offense charged in Count Seven. Nor is there any corroborating evidence. Therefore, under the law in effect at the time of the offense, the conviction must be reversed and the Appellant acquitted of that charge. (Id.)

PRAYER

In light of the foregoing facts and arguments, Appellant respectfully prays that this Court set aside the judgement of the District Court and reverse these convictions and remand for a new trial; or, in the alternative, reverse the convictions on Counts One, Three, Four, and/or Seven and remand for a new trial.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, William F. Street, hereby certify that a true and correct copy of the above and foregoing Appellant's Brief was mailed, via U.S. Mail, postage pre-paid, or hand delivered, to the following persons, in accordance with Tex. R. App. P. 202(e) on this 28th day of August, 1997.

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APPENDIX B

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests that this matter be set for oral argument and that counsel be appointed for purposes of that hearing. Oral argument is necessary to resolve, explain or expand on any issue of which this Court may be unresolved and to affirm the petitioner's position on both the law and the facts.

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IN THE

COURT OF CRIMINAL APPEALS

AT AUSTIN, TEXAS

No. ________

SCOTT LESLIE CARMELL,

Petitioner-Appellant,

V.

THE STATE OF TEXAS,

Respondent-Appellee.

APPELLANT'S PRO SE PETITION FOR DISCRETIONARY REVIEW

On Petition For Discretionary Review From The Second Court of Appeals in Cause No. 02-97-197-CR

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW Scott Leslie Carmell, pro se appellant and, pursuant to Rule 68, Texas Rules of Appellate Procedure, petitions this Court to exercise its discretion and review the opinion of the Second Court of Appeals dated February 12, 1998. In support, petitioner would show the following:

III.

QUESTIONS PRESENTED FOR REVIEW

(1)

Did the court of appeals err in concluding that application of the 1993 version of article 38.07, V.A.C.C.P., was not an ex post facto violation when: (i) the offense occurred in 1992; (ii) there was no outcry for approximately three years; and, (iii) petitioner would have otherwise been entitled to an acquittal?

(2)

Did the court of appeals err in concluding that Rule 608(b) of the Rules of Criminal Evidence was dispositive of the prosecutor's intentionally withholding evidence favorable to the accused?

(3)

Did the court of appeals err in concluding that testimony of "genital area" and "pubic hair" were legally sufficient to support the convictions, when the terms are not interchangeable and do not include the female sexual organ as defined by statute?

IV.

REASONS FOR REVIEW

Ground For Review No. 1 - Restated

The court of appeals erred in concluding that application of the 1993 version of article 38.07, V.A.C.C.P., was not an ex post facto violation when: (i) the offense occurred in 1992; (ii) there was no outcry for approximately three years; and, (iii) petitioner would have otherwise been entitled to an acquittal.

Arguments and Authorities

The court of appeals decided an important question of state and federal law that has not been but should be decided by this Court, and which is in conflict with decisions of other courts of appeals on the same issue. That is, the court of appeals has misconstrued a statute to the accused's disadvantage, i.e., whether the 1993 version of article 38.07 C.C.P. is an ex post facto violation as applied to the facts of this case.

committed against victims age 14 years and over. Id., at 683 (corroboration of outcry requirements were not met and the evidence was insufficient to support the conviction). Other courts of appeals have entered acquittals in similar situations as what petitioner now faces. See Friedel v. State, 832 S.W.2d 420 (Tex.App.-Austin 1992); Jones v. State, 789 S.W.2d 330 (Tex.App.-Houston [14th Dist.] 1990); Hill v. State, 658 S.W.2d 705 (Tex.App.-Dallas 1983) (reversed on other grounds). See also Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996).

In this case, application of the newer version of article 38.07 is unconstitutional and constitutes an ex post facto application for the reason that it changes the legal rules of evidence and requires less proof to convict from the law in effect at the time of the offense, Lindsey v. State, 672 S.W.2d 892, 894 (Tex.App.-Dallas 1984), it deprives petitioner of an affirmative defense available at the time when the act was committed, see Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996); Collins v. Youngblood, 110 S.Ct. 2715 (1990); Ex Parte Hallmark, 883 S.W.2d 672 (Tex.Cr.App. 1994) and Grimes v. State, 807 S.W.2d 582 (Tex.Cr.App. 1991), and, finally, it deprives petitioner of an acquittal that he would otherwise have been entitled to. Bowers, Friedle, Hill and Jones, all supra.

Hence, review be granted in this case and petitioner is entitled to an acquittal under the law in effect at the time of the commission of the offense.

This case is distinguished from Ramos because the evidence excluded in Ramos was of sexual exploits of the complaining witness and her mother after the defendant step-father had left the family, and was offered solely for attacking the character of the complainant and her mother. Id., 819 S.W.2d at 942. In the instant case, however, the evidence of an extramarital affair before separation, which clearly indicates bias on the part of the mother, and is offered only to show bias against the accused is admissible into evidence for the jury's informed deliberation.

Evidence of a witnesses' bias is critical to the fairness and proper functioning of the adversarial process. Juries cannot weigh evidence and testimony without full knowledge of the witnesses' motivations. Motives which operate in a witnesses' mind should never be regarded as immaterial or irrelevant. Steve v. State, 614 S.W.2d 137, 140 (Tex.Cr.App. 1981), favorably citing McDonald v. State, 77 Tex.Cr.Rep. 612, 179 S.W. 80 (1915). Great and fair latitude should be allowed the accused to show animosity, bias, or motive on part of the witness testifying against the accused. The jury should not be deprived of the fair chance to weigh that witnesses' credibility by failure to explore that bias, motive or animosity. Steve, 614 S.W.2d at 140. In this case, no greater tool exists for the mother than use of the courts to get what she wants. In one sweep she takes home, finances, car, property and children, and rids herself of the husband while enjoying her affair and having another man's baby, while at the same time she and the daughter bring serious felony charges against the husband.

and motive and should therefore have been admitted for the jury's deliberation. The conviction should therefore be reversed and this cause remanded to the trial court for further proceedings.

(3)

Ground For Relief No. 3 - Restated

The court of appeals erred in concluding that testimony of "genital area" and "pubic hair" were legally sufficient to support the convictions, when the terms are not interchangeable and do not include the female sexual organ as defined by statute.

Arguments and Authorities

The court of appeals has decided an important question of law in a way that conflicts with this Court's previous decisions on the same issue, and that of other courts of appeals, in declaring that "pubic hair" and "genital area" constitute parts of the "female sexual organ" for purposes of Sections 22.011 and 22.021.

The question presented here is whether the court of appeals erred in equating "genital area" and "pubic hair" with "genitals" and the "female sexual organ." Female sexual organs have been defined in opinion as the vulva, the vagina and vaginal canal, the uterus, mons pubis and the labia, but has never been defined by statute or opinion as "the pubic hair" or the "genital area." The terms "genital area," "pubic hair," and "female sexual organ" simply are not synonymous in opinion or statute. The term genital area includes much more than just the genitals or the female sexual organ. The term genital area is not sufficient to prove genitals per se. As a matter of logic as well as linguistics, "genital area" must mean the area around and including the genitals. This area, then, includes the female

the offense. The terms "genital area," "pubic area," and "pubic hair" simply are not legally sufficient to sustain the conviction and are too vague and poorly defined to sustain a conviction in a case where the statute requires proof of contact with the "female sexual organ." Had the indictment alleged merely "pubic area," "pubic hair," or genital area," it would have been subject to a motion to quash for failure to track the necessary statutory language and failure to put the accused on notice to any criminal offense.

The statutes require proof of contact with "the female sexual organ," and not "in the area of the female sexual organ." The court of appeals held that the upper thigh and lower abdomen are parts of the sexual organ because they are in the area of the sexual organ, resulting in unwarranted legislation from the bench making it a criminal offense to touch one in the area of the thigh or abdomen, despite the legislature never doing so.

The complainant testified that the petitioner touched her "pubic hair" during a back rub. Appellant's Brief, at page 6, citing the record at SOF IX, p. 80. Petitioner can find no Texas legal authority that the term "genitals" includes "pubic hair."

This Court, examining the very statute at issue here, held that the word "genitals" includes the vulva and surrounding area of the vagina itself. Clark v. State, 558 S.W.2d 887 (Tex.Cr.App. 1977). However, as indicated ,the State's witness did not testify that the petitioner touched her vagina or her genitals. She testified only that petitioner touched her "pubic hair." It is unlikely that the legislature contemplated "pubic

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a true and correct copy of the forgoing APPELLANT'S PRO SE PETITION FOR DISCRETIONARY REVIEW on opposing counsel by mailing same, via U.S. Mail, first-class postage prepaid, properly enveloped and deposited in the prison institution's internal mailbox for outside mailing on this 18 day of May, 1998, addressed to: State Prosecuting Attorney, P.O. Box 12405, Austin, TX 78711 (Rule 68.11, TRAP) and to the Denton County Criminal District Attorney's Office, 401 W. Hickory Street, J. Carroll Courts Bldg., Denton, Texas 76201.

Scott Leslie Carmell 777548

Scott Leslie Carmell #777548
Petitioner-Appellant, Pro Se

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

SCOTT LESLIE CARMELL	APPELLANT
VS.	
THE STATE OF TEXAS	STATE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY

OPINION

I. INTRODUCTION

Appellant Scott Leslie Carmell was convicted of eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault against his stepdaughter K.M. The jury assessed punishment at life on the aggravated sexual assault counts and 20 years on the remaining counts. In six points, appellant argues that (1) the trial court erred in denying his motion for new trial because the State did not disclose impeachment evidence and (2)

would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, appellant touched her "on the pubic hair" during one of the back rubs. Appellant then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. Appellant claimed that this was part of the family's bonding process.

In the summer of 1991, appellant took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, appellant and K.M. were sleeping together nude when appellant pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, appellant took K.M. into his bedroom for a "nap." They undressed, and appellant pulled her on top of his erect penis, touching her "genital area."

These incidents and more finally led to appellant having sex with K.M. in September 1993. Two days later, appellant "married" K.M. in a mock ceremony and continued having sex with her until early 1995.[2] K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited appellant in jail, he wrote

[2]Appellant was a devoted correspondent and would send letters and car' to K.M., signing them "Dad, friend, and partner for life." [IX RR 165]

may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *See Matson*, 819 S.W.2d at 846.

C. June 1992 Sexual Assault

1. Timing of the outcry

In his sixth point, appellant argues that he should be acquitted of one of the sexual assault convictions because K.M. did not tell her mother about the abuse until "years after the offense" and there was nothing to corroborate K.M.'s version of events.

Appellant bases his argument on the version of article 38.07 that was in effect in June 1992, the date of the charged offense of sexual assault:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.[3]

[3]Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91 & Act of May 29, 1983, 68th Leg., R.S., ch. 977, § 7, 1983 Tex. Gen. Laws 5317, 5319.

Accordingly, because K.M. was younger than 18 at the time of the offense, the one-year time limit on her outcry does not apply. We overrule appellant's sixth point.[5]

2. Sexual organ contact

In his fifth point, appellant claims that the evidence was legally insufficient to support the sexual assault conviction because K.M.'s testimony that appellant touched her "genital area" with his penis is not specific enough to prove that his penis contacted K.M.'s sexual organ in June 1992. Appellant concedes that if K.M. had testified that appellant's penis touched her "genitals" or "genitalia," the evidence would be sufficient. *See Aylor v. State*, 727 S.W.2d 727, 729-30 (Tex. App.—Austin 1987, pet. ref'd) (citing *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977)).

Sexual assault is proven when the State shows that the defendant "intentionally or knowingly cause[d] the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." TEX. PENAL CODE ANN. § 22.011(a)(2)(C) (Vernon Supp. 1998). "'[G]enitals' includes the vulva which immediately surrounds the vagina." *Clark*,

[5]In three supplemental points, appellant asserts that this argument also applies to three of the indecency with a child counts, which occurred in March, June, and July of 1993. Because we have held that the 1993 version of the statute applied to appellant, we overrule supplemental points seven, eight, and nine.

Indecency with a child requires "sexual contact" between the victim and the defendant. TEX. PENAL CODE ANN. § 21.11 (Vernon 1994). Sexual contact is defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *Id.* § 21.01(2). The external genital organs include the mons pubis, which is "the rounded eminence in front of the pubic symphysis [that] is formed by a collection of fatty tissue beneath the integument. It becomes covered with hair at the time of puberty." CHARLES M. GOSS, GRAY'S ANATOMY 1405 (26th ed. 1954). Thus, by touching K.M.'s pubic hair, appellant touched a part of her genitals. The evidence was legally sufficient and we overrule appellant's second point.

III. FAILURE TO REVEAL IMPEACHMENT EVIDENCE

In his first point, appellant argues that the trial court should have granted him a new trial because the State failed to disclose that Eleanor had another man's child while appellant was in prison. The State does not dispute that it did not disclose this evidence to appellant.

We review the denial of a motion for new trial based on newly-discovered evidence under an abuse of discretion standard. *See Driggers v. State*, 940 S.W.2d 699, 709 (Tex. App.—Texarkana 1996, pet. ref'd) (op. on reh'g). The State must produce exculpatory as well as impeachment evidence to a

IV. CONCLUSION

Because we find that the evidence was legally sufficient and the trial court did not abuse its discretion in denying appellant's motion for new trial, we affirm the trial court's judgments.[6]

PER CURIAM

PANEL F: HOLMAN, J.; CAYCE, C.J.; and DAY, J.

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[6]Appellant has filed a letter asking us to reprimand or replace his court-appointed attorney. His only complaint with counsel is that counsel is not communicating with him. Unless an appellant waives counsel and chooses to represent himself or shows an adequate reason for new counsel, appellant must accept the counsel appointed by the court. *See Halliburton v. State*, 928 S.W.2d 650, 651-52 (Tex. App.—San Antonio 1996, pet. ref'd); *see also Hubbard v. State*, 739 S.W.2d 341, 344 (Tex. Crim. App. 1987). Appellant has done neither, and we deny his requests.

Office of the Attorney General State of Texas
John Cornyn

April 23, 1999

Honorable William K. Suter, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

Re: *Scott Leslie Carmell v. The State of Texas*
No. 98-7540

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine (9) copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, I am forwarding a copy of this brief to Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

Charles A. Palmer

CHARLES A. PALMER
Assistant Attorney General
(512) 936-1400

CAP:cc
Enclosure
c: Scott Leslie Carmell
TDCJ No. 777548
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